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Evidence: 1997-1998 Survey of New York Law

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EVIDENCE

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CONTENTS

INTRODUCTION

Another year has passed with no discernable action toward adopting a Code of Evidence for New York.[1] Our state thus remains one of the few

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1. The unsuccessful codification effort in New York began in 1976 and has produced

without the kind of comprehensive set of evidence rules that now exist in over forty other states.[2]

The most important developments during the *Survey* year resulted from federal decisions including several leading cases in the United States Supreme Court on expert scientific opinion[3] and on privilege.[4] A number of state decisions, even if of less significance, are nonetheless worthy of note. As usual, these developments fall in the areas of hearsay, experts, witnesses and privilege. Therefore, these topics dominate our discussion.

I. HEARSAY

A. Forfeiture of Objection by Wrongdoing

Several years ago, in *People v. Geraci*, the New York Court of Appeals announced that a party who procures the unavailability of a witness by violence, threats or knowing acquiescence in wrongdoing is precluded from asserting either a hearsay objection or a violation of the constitutional right of confrontation.[5] The effect of this doctrine is to admit relevant hearsay which would otherwise be inadmissible. Thus, in *Geraci*, defendant was convicted of manslaughter based primarily on the grand jury testimony of an eyewitness who, because of intimidation, refused to testify at the trial.[6] The Court explained that this exception was not based upon the

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versions of proposed Codes in 1980, 1982, and 1991-92. *See* MICHAEL M. MARTIN ET AL., NEW YORK EVIDENCE HANDBOOK § 1.2.2 (1997). For a history of the failed effort, see Barbara C. Salken, *To Codify or Not To Codify—That is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641 (1992).

2. The Federal Rules of Evidence provided the blueprint for most state codes. By 1994, 35 states had adopted codes based on the federal model: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Washington, Wisconsin, and Wyoming. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE: DOCTRINE & PRACTICE § 1.2, at 4 n.2 (1995). Since 1994, Indiana and Maryland have also adopted codes based on the federal mode. *See* IND. CODE ANN. §§ 101-1101 (West 1997); MD. REGS. CODE §§ 5-101 to 5-1008 (1994). In addition, California, Kansas, Puerto Rico and several other states have codes that predated the enactment of the Federal Rules. MUELLER AND KIRKPATRICK, *supra*, § 1.2 at 5 & n.6. A detailed description of the benefits of codification is given in Faust F. Rossi, *The Federal Rules of Evidence—Past, Present, and Future: A Twenty-Year Perspective*, 28 LOY. L.A. L. REV. 1271 (1995).

3. *See* United States v. Scheffer, 523 U.S. 303 (1998); General Elec. Co. v. Joiner, 522 U.S. 136 (1997).

4. *See* Swindler & Berlin v. United States, 524 U.S. 399 (1998); United States v. Balsys, 118 S. Ct. 2218 (1998).

5. 85 N.Y.2d 359, 365-66, 649 N.E.2d 817, 820-21, 625 N.Y.S.2d 469, 472-73 (1995).

6. *Id.* at 364-65, 649 N.E.2d at 820, 625 N.Y.S.2d at 472.

inherent reliability of this class of hearsay.[7] Rather, the exception is founded upon a rule of necessity to preserve the integrity of the adversary process by not allowing the party to profit from its wrongdoing in procuring witness unavailability and in order to reduce the incentive to tamper with witnesses.[8]

Federal courts follow this same principle. Rule 804(b)(5) of the Federal Rules of Evidence codifies existing federal law and expressly provides for forfeiture of the right to object upon a showing that a witness has been rendered unavailable to testify through the misconduct of the defendant personally or of others acting with defendant's knowing acquiescence.[9] There is, however, a difference between New York and federal law on the standard of proof required to invoke forfeiture of defendant's right to object. In *Geraci*, the New York Court of Appeals held that at a fact-based hearing, the people must demonstrate by *clear and convincing evidence* that the defendant caused the declarant witness's unavailability.[10] In this regard, *Geraci* differs from the federal standard which imposes only a *preponderance of the evidence* test to establish the defendant's wrongdoing.[11] This distinction may be more theoretical than real. Although *Geraci* requires that witness tampering be shown by clear and convincing evidence, it is not necessary that defendant's involvement be shown by direct evidence. At the fact-based hearing to determine if defendant's misconduct caused the unavailability of the witness, hearsay is admissible and, because of "the inherently surreptitious nature of witness tampering," circumstantial evidence may be used.[12] So far, New York courts have shown a willingness to find forfeiture on evidence that some would view as considerably less than clear and convincing.

A good example of this tendency is this year's New York Court of Appeals decision in *People v. Cotto,* a murder case in which use of the *Geraci* principle was approved and, perhaps, expanded.[13] Here, the People's sole living eyewitness made statements identifying the defendant as

7. *Id.* at 367, 649 N.E.2d at 822, 625 N.Y.S.2d at 474.
8. *Id.* at 368, 649 N.E.2d at 822, 625 N.Y.S.2d at 474.
9. *See* United States v. Mastrangolo, 693 F.2d 269, 272-73 (2d Cir. 1982).
10. 85 N.Y.2d 359, 365, 649 N.E.2d 817, 820, 625 N.Y.S.2d 469, 472 (1995).
11. *Id.* at 367, 649 N.E.2d at 822, 625 N.Y.S.2d at 474 (rejecting the Federal preponderance of the evidence standard in favor of the more exacting clear and convincing test because the latter best recognizes the gravity of the interest at stake and most effectively balances the need to reduce the risk of error against the practical difficulties of proving witness tampering).
12. *Id.* at 369, 649 N.E.2d at 823, 625 N.Y.S.2d at 475.
13. 92 N.Y.2d 68, 72, 699 N.E.2d 394, 396, 677 N.Y.S.2d 35, 37 (1998).

the killer.[14] On the eve of trial, he advised the prosecution in a telephone message that he would not identify defendant because "his family was in jeopardy."[15] At a hearing, the assistant district attorney testified that the witness told him that the witness' mother and wife had been approached by unnamed individuals who demanded to know if the witness was going to testify and that they had asked about his whereabouts and had stated that there was word on the street that a "contract" was out on him.[16] There was no direct evidence that the defendant was involved in these intimidating maneuvers.[17] Much of the prosecution's evidence, which supported witness tampering, consisted of recitals of what prosecutors had been told about what the witness said about conversations between his relatives and the threatening individuals.[18] That, plus the witness's vague expressions of fear for himself and his family, were sufficient to admit the prior hearsay statements identifying defendant as the killer.[19] Justices Smith and Titone, writing in dissent, found little to support the finding that defendant was involved in the threats.[20] They complained that "under the authority of this case, vague allegations of 'word on the street' combined with tales of unsubstantiated visits by unnamed individuals will suffice to establish clear and convincing evidence of a defendant's unlawful interference with a witness."[21]

Cotto somewhat expands upon *Geraci* in two respects. The hearsay that was admitted in *Geraci* was grand jury testimony. In *Cotto* the Court made clear that the forfeiture principle is not limited to admitting the prior grand jury testimony of an intimidated witness.[22] It applies to any out-of-court statements of a reliable nature.[23] There is another aspect of potential importance in *Cotto*. The trial court ruling admitting hearsay which was affirmed by the Court of Appeals did more than reject defendant's hearsay and confrontation objections.[24] In *Cotto*, the intimidated witness was present in court.[25] He testified on direct examination by the prosecution and disavowed his prior hearsay declarations identifying defendant.[26] He was

14. *Id.* at 80, 699 N.E.2d at 400, 677 N.Y.S.2d at 41.
15. *Id.* at 73, 699 N.E.2d at 396, 677 N.Y.S.2d at 37.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 86, 699 N.E.2d at 404, 677 N.Y.S.2d at 45 (Smith, dissenting opinion).
21. *Id.*
22. *Id.* at 77, 699 N.E.2d at 399, 677 N.Y.S.2d at 40.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 75, 699 N.E.2d at 397, 677 N.Y.S.2d at 40.

then excused from the courtroom.[27] The trial judge ruled that because of his misconduct, defendant was precluded from cross-examining the witness about any subject, not just about the prior statements.[28] The trial judge stated that no truth-serving function will be served by allowing the defendant to cross-examine on any subject under the circumstances here presented.[29] The dissent argued that preventing cross-examination by defendant about anything went beyond *Geraci* and constituted fatal error.[30] The majority answered that this question must be left for another day since it was not adequately or specifically raised by defendant in the lower court.[31]

In the months ahead the New York Court of Appeals will have the opportunity to speak again on the question of how the clear and convincing standard should be applied in forfeiture of objection cases. This opportunity arises from the Court's grant of leave to appeal from the Third Department's decision in *People v. Johnson*.[32] In this case, Johnson was convicted of sex crimes involving a thirteen-year-old girl.[33] The victim testified against defendant before a grand jury.[34] But at the trial, she refused to answer any questions, repeatedly responding "I have nothing to say."[35] She indicated that she did not want to be there and would not explain her refusal to testify other than stating "because I choose not to."[36] At this point the trial judge granted the prosecutor's request to admit the girl's grand jury testimony.[37] The trial judge saw no need to hold a fact-based hearing because sufficient evidence that the victim's refusal was induced by defendant was already before the court.[38] The gist of the evidence at trial showed that defendant, using his position as a provider of pastoral and counseling services, acted as a surrogate father, with power to dominate the girl's decisions; letters demonstrated the victim's "obsessive craving" for defendant's presence and approval; defendant urged the girl to protect him by lying about their relationship and telling her that "only her words could send him to jail."[39] Defendant's conviction was reversed by a

27. *Id.*
28. *Id.* at 78, 699 N.E.2d at 399, 677 N.Y.S.2d at 40.
29. *Id.*
30. *Id.* at 83-84, 699 N.E.2d at 402-03, 677 N.Y.S.2d at 43-44.
31. *Id.* at 78, 699 N.E.2d at 399, 677 N.Y.S.2d at 40.
32. 250 A.D.2d 922, 673 N.Y.S.2d 755 (3d Dep't 1998), *leave to appeal granted*, 92 N.Y.2d 884, 700 N.E.2d 569, 678 N.Y.S.2d 31 (1998).
33. *Id.*
34. *Id.*
35. *Id.*, 673 N.Y.S.2d at 757.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*, 673 N.Y.S.2d at 758-59.

divided appellate division.[40] The majority faulted the trial court's procedural failure to hold a fact-based evidentiary hearing.[41] But it also concluded that the evidence at trial was insufficient to show by clear and convincing evidence that the victim's refusal to testify was caused by defendant.[42] The Third Department majority noted that the girl had resisted cooperating with the police even before defendant knew he was being investigated.[43] It concluded that "we cannot let this conviction stand, resting as it does principally on crucial testimony which was improperly admitted."[44] It remains to be seen if the Court of Appeals agrees.[45]

B. Excited Utterance

The excited utterance is a well-established exception to the rule against hearsay.[46] The essential element of the exception is that the declarant spoke while under the stress of excitement caused by a startling event.[47] Justification for the exception turns on the assumption that excitement stills the ability to reflect and, therefore, the declarant cannot fabricate.[48] Two Court of Appeals opinions during the survey period approved use of this exception to admit out-of-court statements of victims who identified their attackers.[49]

People v. Fratello involves an utterance that technically fits the definition of the exception but yet may be unreliable.[50] The decision is significant because the sole evidence leading to defendant's conviction were the victim's excited utterances which were repudiated when the victim later testified at trial.[51] *Fratello* arose out of a shooting of Peduto during a high speed car chase.[52] Peduto was shot from behind and suffered head and body wounds.[53] He lost control of his vehicle and collided with two parked

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40. 250 A.D.2d at 922, 673 N.Y.S.2d at 755.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*, 673 N.Y.S.2d at 757.
45. Leave to appeal was granted at 92 N.Y.2d 884, 700 N.E.2d 569, 678 N.Y.S.2d 31 (1998). The case has been argued in the Court of Appeals and is awaiting decision.
46. FED. R. EVID. 803(2).
47. *Id.*
48. *Id.* (advisory committee's note).
49. People v. Fratello, 92 N.Y.2d 565, 510, 706 N.E.2d 1173, 1175, 684 N.Y.S.2d 149, 151 (1998); People v. Cotto, 92 N.Y.2d 68, 78, 699 N.E.2d 394, 399, 677 N.Y.S.2d 35, 40 (1998).
50. *Fratello*, 92 N.Y.2d at 565, 706 N.E.2d at 1173, 684 N.Y.S.2d at 149.
51. *Id.* at 569, 706 N.E.2d at 1174, 684 N.Y.S.2d at 150-51.
52. *Id.*, 706 N.E.2d at 1174, 684 N.Y.S.2d at 150.
53. *Id.*

cars. His assailants escaped in their vehicle.[54] Two out-of-court statements by Peduto naming the defendant, Fratello, as his attacker were admitted.[55] The first was made within a minute of the car crash to a person who came to assist and asked what happened.[56] At that time Peduto was bleeding profusely, moaning in pain and begging for help.[57] The other was made at the hospital ten minutes later in response to questioning by a police officer.[58] The Court of Appeals majority called these utterances "near-classic examples of the excited utterance exception."[59] It noted that neither the time lapse nor the fact that the utterances were in response to questions would impair their admissibility since neither of these factors detracted from their spontaneity.[60] True enough, but at least three circumstances led the dissent to question their reliability.[61] First, Peduto recanted his previous identifications in an affidavit submitted before trial and, in fact, testified for the defense and denied that defendant was one of the persons who shot him.[62] Second, the circumstances of the high speed car chase raise questions about Peduto's ability to observe his attackers and suggest that his utterances may have been no more than speculation.[63] Third, there was considerable evidence of bias on the part of Peduto against defendant.[64] Peduto and defendant had been involved together in criminal activity.[65] However, there had been a falling out between the two.[66] Before the car chase, Peduto had allegedly shot defendant and had attempted to kill one of defendant's relatives.[67] From the time of that incident, Peduto had reason to fear for his safety.[68] When the car chase began, it was likely that Peduto assumed the defendant was involved whether Peduto could see him or not.[69] The majority considered these matters as factors affecting the weight of the evidence, not its admissibility.[70] Given the animosity between Peduto and defendant, and the poor character of the declarant, the dissent stated that

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 570, 706 N.E.2d at 1175, 684 N.Y.S.2d at 151.
60. *Id.*
61. *Id.* at 575, 706 N.E.2d at 1178, 684 N.Y.S.2d at 154.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 577, 706 N.E.2d at 1179, 684 N.Y.S.2d at 155.

any statement by Peduto, inculpatory or exculpatory could not be reliable.[71] Even so, the dissent did not find the utterances inadmissible.[72] Instead, it concluded that the out-of-court identifications—the only evidence linking defendant to the shooting—were legally insufficient to support the conviction.[73]

People v. Cotto, previously discussed under the heading of forfeiture of objection to hearsay, also involved a significant discussion of the excited utterance exception.[74] Here, the shooting victim, while being transported to the hospital, was repeatedly questioned about the identity of his assailant by a police officer and a medical technician.[75] Although the victim was described as conscious and lucid, he at first declined to name his attacker.[76] Gradually, after some prompting, the witness offered a first name.[77] More questions and reminders of his imminent demise led to identification of the defendant.[78] The question presented was whether, under these circumstances, it can be said that the excitement of the gunshot would deprive declarant of the opportunity to reflect.[79] A majority of the Court of Appeals thought so.[80] The dissent, however, insisted that the reflective nature of the victim's answers in response to multiple questions and prodding "remove[d] the statements from the realm of the excited utterance exception."[81]

C. Prior Witness Statements of Identification

An out-of-court statement of identification at common law constitutes inadmissible hearsay. Sections 60.30 and 60.25 of the New York Criminal Procedure Law create statutory exceptions to the rule against hearsay.[82] These exceptions are limited in scope. Section 60.25, for example, allows a third party to testify to a declarant's prior identification only when the declarant testifies at trial and cannot identify the defendant "on the basis of present recollection."[83] In other words, the statute envisions that the de-

71. *Id.*
72. *Id.*
73. *Id.*
74. 92 N.Y.2d at 68, 699 N.E.2d at 394, 677 N.Y.S.2d at 35.
75. *Id.* at 73-74, 699 N.E.2d at 396-97, 677 N.Y.S.2d at 37-38.
76. *Id.* at 74, 699 N.E.2d at 397, 677 N.Y.S.2d at 38.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 90, 699 N.E.2d at 406, 677 N.Y.S.2d at 47.
82. N.Y. CRIM. PROC. LAW §§ 60.25, 60.30 (McKinney 1997).
83. N.Y. CPL 60.25.

clarant will testify about his prior identification but will indicate that he now cannot identify defendant because of a failure of memory. Then another person, usually a police officer, may testify that declarant previously identified the defendant.[84] In what appears to be a misapplication of the statute, the Second Department allowed third-party testimony about an unavailable declarant's prior identification.

In *People v. Patterson* the owner of a store who witnessed a robbery made a pretrial lineup identification.[85] The owner, however, died before trial of causes unrelated to the robbery.[86] The trial court permitted a police officer to testify at trial that the owner identified the defendant in a lineup.[87] The appellate division majority concluded that section 60.25 is applicable because the store owner, due to his death, was unavailable to make an in-court identification.[88] But the statute authorizes no such exception for an "unavailable" declarant who made the prior statement of identification.[89] Indeed, section 60.25 requires that the identifying declarant be available at trial since "there must be testimony . . . [from him] which establishes a lack of present recollection of the defendant as the perpetrator."[90]

D. Employee Admissions

In New York, the statement of an employee may be received as an admission against the employer only if the employee has the authority to speak on behalf of the employer.[91] Contrary to the Federal Rules of Evidence and the modern trend, authority on the part of the employee to act is not enough; speaking authority is required.[92] As a result of this antiquated and widely criticized limitation, most post-accident employee statements offered by an injured plaintiff against the employer will be excluded.

Fontana v. Fortunoff exemplifies the New York limitation.[93] Plaintiff Fontana slipped and fell in a department store owned by defendants and

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84. *See* MARTIN, *supra* note 1, § 8.3.1.3 (1997) (discusses limitations on these statutory exceptions to the rule against hearsay).

85. 242 A.D.2d 740, 741, 662 N.Y.S.2d 803, 804 (1997), *leave to appeal granted*, 92 N.Y.2d 903, 702 N.E.2d 852, 680 N.Y.S.2d 67.

86. *Id.* at 742, 662 N.Y.S.2d at 805.

87. *Id.*

88. *Id.*

89. N.Y. CPL 60.25.

90. *Id.*

91. Loschiavo v. Port Auth. of N.Y. & N.J., 58 N.Y.2d 1040, 1041, 448 N.E.2d 1351, 1352, 462 N.Y.S.2d 440, 441 (1983).

92. *Id.* Lowen v. Great Atl. & Pac. Tea Co., 223 A.D.2d 534, 535, 636 N.Y.S.2d 393, 393 (2d Dep't 1996).

93. 246 A.D.2d 626, 626, 668 N.Y.S.2d 394, 395 (2d Dep't 1998).

alleged that the fall was caused by flower petals strewn hazardly on the floor of the premises.[94] In an effort to show notice and knowledge, plaintiff sought to use the hearsay statement of defendant's employee purporting to show that defendant had prior actual notice of the condition.[95] Since there was no showing that the employee possessed authority to speak for defendant, the out-of-court statements were excluded.[96]

E. Former Testimony

Under both federal and New York law, the prior testimony of a person who is unavailable and who has testified at a proper deposition may be admitted against the party who had an opportunity and similar motive to develop the deposition testimony. It would not be excludable as hearsay because it would qualify under the former testimony exception to the rule against hearsay.[97] Under Rule 403 of the Federal Rules of Evidence and under comparable New York case law, evidence that is relevant and otherwise admissible "may be excluded if its probative value is substantially outweighed by the danger of prejudice."[98] It is understood that application of this principle requires a balancing analysis, and the trial judge has broad discretion to weigh the probative value of the evidence against the negative factors. Assume that deposition testimony clearly qualifies under the former testimony exception to the rule against hearsay. May the trial judge still exclude it on the ground that the testimony is incomplete, misleading or of questionable truthfulness? The answer is clearly "yes" according to a recent federal decision.

In *Li v. Canarozzi*, the Second Circuit upheld the trial court's exclusion of deposition testimony.[99] Federal Rule 403 was held to trump the federal former testimony exception to hearsay as embodied in Federal Evidence Rule 804(b)(1). In *Canarozzi*, the plaintiff inmate sued federal corrections officers for assault claiming that he and two fellow inmates were beaten while being transported in an elevator.[100] At the trial, one of the fellow inmates, an alleged eyewitness to plaintiff's assault, refused to tes-

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94. *Id.* at 626-27, 668 N.Y.S.2d at 395.

95. *Id.*

96. *Id.*

97. FED. R. EVID. 804(b)(1); N.Y. C.P.L.R. 3117, 4517 (McKinney 1998); Fleury v. Edwards, 14 N.Y.2d 334, 337-39, 200 N.E.2d 550, 552-53, 251 N.Y.S.2d 647, 650-51 (1964).

98. FED. R. EVID. 403; People v. Conyers, 52 N.Y.2d 454, 458-59, 420 N.E.2d 933, 935-36, 438 N.Y.S.2d 741, 743-44 (N.Y. 1981); MARTIN, *supra* note 1, § 4.6.

99. 142 F.3d 83, 84 (2d Cir. 1998).

100. *Id.* at 84-85.

tify.[101] He was thus ruled to be unavailable.[102] He had testified previously, however, at a discovery deposition in the case.[103] When the eyewitness was questioned about his deposition testimony by the trial judge, the witness raised questions as to whether his deposition answers were complete.[104] The trial court conceded that under Rule 804(b)(1) of the Federal Rules of Evidence, the deposition constituted former testimony and was not excluded by the hearsay rule.[105] Nonetheless, the district court excluded the deposition because (1) it was less than credible in light of the declarant's own statements; (2) answers in the deposition were vague; and (3) the testimony was cumulative of other evidence.[106] Therefore, the court concluded that admission of the deposition posed too serious a risk of unfair prejudice to defendants.[107]

Plaintiff's position was that the negative factors cited by the district court were jury questions.[108] The issue presented is one of distinguishing between credibility which is for the jury and reliability which is appropriate for judicial evaluation in striking the Rule 403 balance. The Second Circuit affirmed the trial judge's exclusion of the evidence.[109] It found that the district court was expressly concerned with the respective roles of judge and jury.[110] The issue was not really one of credibility. The problem was that the trial judge was unable to determine what the witness actually said at the deposition and whether he had completed his answers. Therefore, the court did not weigh credibility in balancing probative value against unfair prejudice.[111]

II. OPINIONS AND EXPERTS

A. Appropriateness of Expert Testimony

In the past, New York adhered to the traditional view that allowed expert testimony only on issues that were beyond the ken of the ordinary juror.[112] The Federal Rules of Evidence relaxed this necessity standard and

101. *Id.* at 85-86.
102. *Id.* at 86.
103. *Id.*
104. *Id.* at 85.
105. *Id.* at 88.
106. *Id.* at 86-87.
107. *Id.*
108. *Id.* at 86.
109. *Canarozzi*, 142 F.3d at 83.
110. *Id.*
111. *Id.* at 89.
112. Kulak v. Nationwide Mut. Ins. Co., 40 N.Y.2d 140, 148, 351 N.E.2d 735, 740,

substituted a "helpfulness" test based upon the rationale that specialized knowledge is often helpful, even as to ordinary matters, because it may add precision or depth to the understanding of the trier of fact.[113] In recent years, some have suggested that New York is moving toward the federal standard; that is, an expert may testify even as to matters that are within the competence of jurors, if the expert can assist by deepening or sharpening their perception.[114] In fact, at least among lower and mid-level appellate courts, there are decisions supporting both approaches.[115] This may be because the Court of Appeals has used language which appears to combine both approaches. *DeLong v. County of Erie* states the oft-cited precept that "the guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror."[116]

A surprising example of liberal admissibility during the survey period occurred in the New York Court of Appeals decision of *Price v. New York City Housing Authority*.[117] In *Price*, plaintiff, a seventeen-year-old girl was accosted near the lobby elevator of the building in which she lived, pushed into the elevator and taken to the roof where she was robbed and raped at knife point.[118] The rapist was an intruder who entered the building through the front door which was not equipped with a lock.[119] The victim sued the Housing Authority alleging that its negligent failure to provide minimum security was the proximate cause of her injuries.[120] The defendant Housing Authority conceded its negligence in failing to equip the building's front door with a lock and also conceded that the rapist was not a building resident and that he entered through the unlocked front door.[121] The only con-

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386 N.Y.S.2d 87, 92 (1976).

113. FED. R. EVID. 702 ("[I]f scientific, technical, or other specialized knowledge will *assist* the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto.") (emphasis added).

114. MARTIN, *supra* note 1, § 7.2.2.

115. *Compare* Fortunato v. Dower Union Free Sch. Dist., 224 A.D.2d 658, 658, 638 N.Y.S.2d 727, 728 (2d Dep't 1996) (where the court stressed a necessity test, stating that unless jurors are unable or incompetent to evaluate the evidence and draw inferences and conclusions, the opinions of experts, which intrude on the province of the jury, are both unnecessary and improper), *with* Selkowitz v. County of Nassau, 45 N.Y.2d 97, 103-04, 379 N.E.2d 1140, 1144, 468 N.Y.S.2d 10, 13 (1978), *and* People v. Cronin, 60 N.Y.2d 430, 433, 458 N.E.2d 351, 352, 470 N.Y.S.2d 110, 111 (1983)).

116. 60 N.Y.2d 296, 307, 457 N.E.2d 717, 722, 469 N.Y.S.2d 611, 617 (1983).

117. 92 N.Y.2d 553, 706 N.E.2d 1167, 684 N.Y.S.2d 143 (1998).

118. *Id.* at 557, 706 N.E.2d at 1168, 684 N.Y.S.2d at 144.

119. *Id.*

120. *Id.*

121. *Id.* at 561, 706 N.E.2d at 1170, 684 N.Y.S.2d at 146.

tested issue was proximate cause.[122] Defendant produced an expert in "criminal behavior analysis" who purported to be capable of "getting inside [the] mind" of the perpetrator.[123] Although the expert had no formal training in psychology or the behavioral sciences, he was allowed to give his opinion that this particular rapist "would not have been deterred by a lock on the door."[124] A divided Court of Appeals approved the admissibility of this expert testimony and affirmed a jury verdict for defendant.[125] The majority cited as authority some of the New York cases which appear to follow the federal standard, one that is more generous in admitting expert testimony.[126] Even under this more accommodating standard the dissent argued that this opinion was not "helpful," but was beyond the qualifications of the expert and amounted to no more than "speculation or supposition."[127]

B. Basis for Expert Opinion

New York decisions frequently quote the general proposition that "it is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness."[128] It is also said that an expert who relies on facts within personal knowledge, but which are not contained in the record, must testify to those facts prior to rendering the opinion.[129] When courts say that the opinion must be based on facts in the record, they usually mean simply that the opinion must be based on facts relevant to the particular case.[130] The expert is not supposed to speculate about what happened and give an opinion based upon his unproven hypothesis.[131]

An example of this limitation is *People v. Colon*, a prosecution arising from an alleged sale of narcotics.[132] A number of recent decisions have

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122. *Id.*
123. *Id.* at 563, 706 N.E.2d at 1172, 684 N.Y.S.2d at 148.
124. *Id.* at 561-62, 706 N.E.2d at 1170-71, 684 N.Y.S.2d at 147.
125. *Id.* at 559-60, 706 N.E.2d at 1169-70, 684 N.Y.S.2d at 146.
126. People v. Miller, 91 N.Y.2d 372, 379, 694 N.E.2d 61, 65, 670 N.Y.S.2d 978, 982 (1998); People v. Cronin, 60 N.Y.2d 430, 433, 458 N.E.2d 351, 352, 470 N.Y.S.2d 110, 111 (1983); Selkowitz v. County of Nassau, 45 N.Y.2d 97, 102, 379 N.E.2d 1140, 1142-43, 408 N.Y.S.2d 10, 12-13 (1978).
127. 92 N.Y.2d at 563, 706 N.E.2d at 1172, 684 N.Y.S.2d at 148.
128. Cassano v. Hagstrom, 5 N.Y.2d 643, 646, 159 N.E.2d 348, 349, 187 N.Y.S.2d 1, 3 (1959); MARTIN, *supra* note 1, § 7.3.
129. People v. Jones, 73 N.Y.2d 427, 430, 539 N.E.2d 96, 98, 541 N.Y.S.2d 340, 342 (1989).
130. *Id.*, 539 N.E.2d at 97, 541 N.Y.S.2d at 341.
131. *Id.*
132. 238 A.D.2d 18, 19, 667 N.Y.S.2d 692, 693 (1st Dep't 1997).

routinely admitted expert testimony for the prosecution to identify and to explain the various roles played by participants in street level drug operations.[133] Frequently, the purpose of this testimony is to explain the absence of the buy money on the person of the defendant at the time of arrest.[134]

In *Colon*, however, the prosecution expert ran afoul of the rule that the opinion must be based on facts in the record or personally known to the witness.[135] At defendant's trial, the undercover officer testified that he gave the accused a marked bill and received narcotics in return.[136] Immediately after this sale, the seller's description was transmitted by the undercover agent to the officer who, minutes later, arrested the defendant.[137] Contrary to expectation, however, a search of the defendant failed to turn up the marked bill.[138] Neither drugs nor money were recovered from the defendant's person.[139] In order to explain the absence of "buy money" the prosecutor presented a police officer to testify as an expert in street-level narcotics transactions.[140] The expert explained in detail how street-level narcotics conspiracies were typically structured.[141] He described how a "steerer" directed customers to a "pitcher," who would obtain the drugs to be sold on an as-needed basis from a "stash man" and pass them to the buyer.[142] The cash from these transactions would be delivered to a "money man."[143] He explained that this activity was safeguarded by "lookouts" and supervised by "managers" or "owners," who would periodically replenish the street-level operation's supply of product.[144] This system was used, according to the expert, to reduce the likelihood that the most exposed members of the conspiracy would, if arrested, be found in possession of either drugs or buy money.[145] Defendant objected on the ground that the opinion would encourage the jury to speculate that defendant was a mem-

133. People v. Hunt, 249 A.D.2d 246, 246, 673 N.Y.S.2d 69, 70 (1st Dep't 1998); People v. Lacey, 245 A.D.2d 145, 145, 666 N.Y.S.2d 157, 157 (1st Dep't 1997); People v. Richards, 245 A.D.2d 106, 107, 666 N.Y.S.2d 144, 146 (1st Dep't 1997); People v. Dryer, 244 A.D.2d 227, 227, 664 N.Y.S.2d 43, 43 (1st Dep't 1997).

134. *Colon*, 238 A.D.2d at 20, 667 N.Y.S.2d at 693.

135. *Id.*

136. *Id.* at 18, 667 N.Y.S.2d at 693.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

ber of a well orchestrated conspiracy to traffic in narcotics.[146] The trial court admitted the expert's testimony for the limited purpose of explaining why neither buy money nor narcotics had been found on defendant at the time of his arrest.[147] The appellate division reversed defendant's conviction and held that the expert testimony should not have been admitted.[148] It reasoned that there was no factual basis in the record for the hypothesis proposed by the people's expert.[149] There was no evidence that the seller acted in concert with anyone.[150] The court noted that there was not a scintilla of proof of the involvement of a "steerer" or a "stash man" or a "money man," or a "lookout" or a "manager."[151] In other words, reasoned the court, "expert testimony is admissible only insofar as it may assist the jury to understand the significance of the evidence properly before it" and it is not a means for placing before the jury a wholly speculative explanation to conceal a gap or inconsistency in proof."[152]

Colon is a significant decision because it will inhibit routine use of police officer experts in drug cases to opine on the nature of street-level narcotics transactions. At least in the First Department, from now on, "if an expert is to attribute the failure to recover drugs and buy money from a defendant to the workings of a conspiracy, there must be some evidence that there was in fact a conspiracy."[153]

There is one judicially created exception to the proposition that expert opinion must be based upon facts personally known and revealed at trial or upon facts that are supported by evidence in the trial record. Under what has been called a form of limited "professional reliability exception," an expert may rely on material, albeit of out-of-court origin, "if it is of a kind accepted in the profession as reliable in forming a professional opinion."[154] In these circumstances the expert has been allowed to rely on hearsay statements which were not admitted. So, for example, in the leading Court of Appeals case of *People v. Sugden*, a psychiatrist was allowed to base his opinion in part on an out-of-court written statement that was not admitted in evidence.[155] Assuming that the expert opinion is admissible under the

146. *Id.* at 20, 667 N.Y.S.2d at 693.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 19, 667 N.Y.S.2d at 693.
152. *Id.*
153. *Id.* at 20, 667 N.Y.S.2d at 693.
154. People v. Sugden, 35 N.Y.2d 453, 460-61, 323 N.E.2d 169, 173, 363 N.Y.S.2d 923, 929 (1974).
155. *Id.*

Sugden rationale, even though the opinion is based upon hearsay, a further question is presented. May the reliable but extra-record hearsay statement upon which the opinion is based also be admitted? That was the question presented during the *Survey* period in *Schwartz v. Gerson*.[156] In this personal injury action, plaintiff's surgeon testified that he reviewed and, in part, relied upon the medical report of another doctor who had previously examined the plaintiff.[157] The hearsay report of the non-testifying doctor was admitted into evidence and read to the jury during the plaintiff's summation.[158] The appellate division concluded that this constituted reversible error.[159] Even assuming that the report was subject to the "professional reliability" exception to the rule that opinion evidence must be based on facts in the record or personally known to the witness, and even assuming that it, therefore, was not improper to admit the opinion, testimony regarding the content of the report was, in the court's view, reversible error.[160] It noted that the error was not harmless because the physical condition of plaintiff was the crucial issue and plaintiff "with no risk of cross-examination of the doctor who prepared the report" was able to read the report in its entirety to the jury.[161]

This same issue has provoked controversy in federal courts. Federal Rule of Evidence 703 clearly provides that the facts or data underlying an opinion need not be admissible in evidence "if of a type reasonably relied upon by experts in the particular field."[162] The sole requirement is that the extra-record facts be the type that experts rely upon in making out-of-court professional decisions. Suppose the proponent of the expert wants to admit this otherwise inadmissible data. May it come in to explain and support the opinion? Federal courts have the discretion to allow it. However, the Advisory Committee for the Federal Rules of Evidence has now proposed an amendment to Rule 703 to limit that discretion.[163] The proposal would add to Rule 703 a sentence stating: "[I]f the facts or data [underlying the opinion] are otherwise admissible, they shall not be disclosed to the jury by the proponent of the opinion or inference unless their probative value substantially outweighs their prejudicial effect."[164] The purpose of this revi-

156. 246 A.D.2d 589, 589, 668 N.Y.S.2d 223, 224 (2d Dep't 1998).
157. *Id.* at 589, 668 N.Y.S.2d at 224.
158. *Id.* at 589-90, 668 N.Y.S.2d at 224.
159. *Id.* at 590, 668 N.Y.S.2d at 224.
160. *Id.*, 668 N.Y.S.2d at 225.
161. *Id.*, 668 N.Y.S.2d at 224.
162. FED. R. EVID. 703.
163. *Id.* (advisory committee's note).
164. *Id.* The Standing Committee of the Judicial Conference Committee on Rules of Practice and Procedure has invited public comment on the proposed amendment.

sion is to emphasize that when an expert reasonably relies on inadmissible information to form an opinion, it is the opinion and not the information, that is admitted as evidence. In other words, the amendment, if adopted, would create a sort of presumption against disclosure of otherwise inadmissible data supporting the expert's opinion.[165]

C. *Expert Opinion in Federal Courts*

As reported in last year's *Survey*, one of the questions that has plagued federal courts involves the scope of the 1993 United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[166] In *Daubert*, the Court abandoned the *Frye* "general acceptance" test for scientific evidence in federal courts.[167] The Court went on to state, however, that under Federal Evidence Rule 702, the trial judge must act as a gatekeeper.[168] As a condition to admissibility, the proponent of scientific expertise must satisfy the judge that the methodology is scientifically valid.[169] The Supreme Court laid out certain criteria to assist in the determination of reliability.[170] These criteria require the trial judge to assess (1) whether the theory underlying the opinion is able to be tested; (2) whether the scientific technique has been tested; (3) whether the theory or technique had been subject to peer review; (4) the known or potential rate of error of the particular technique and the maintenance of standards for controlling the rate of error; (5) the degree of acceptance of the theory or technique within the scientific community.[171] This decision mandates careful scrutiny of complicated expert testimony. Does *Daubert*'s strict criteria apply to an expert opinion that involves only "technical or other specialized knowledge" as well as to "scientific knowledge"?[172] Does it apply when the expert's conclusions are not based on a scientific theory or methodology but simply on skill based experience and training? So far, federal courts have not provided an authoritative answer.[173]

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165. *Id.*
166. 509 U.S. 579 (1993).
167. 509 U.S. at 587.
168. *Id.* at 589.
169. *Id.* at 580
170. *Id.* at 592.
171. *Id.* at 593-94.
172. FED. R. EVID. 702 (defines experts as those qualified in "scientific, technical or other specialized knowledge").
173. As reported in last year's *Survey*, one of the latest decisions on this question was reached in the Southern District of New York in *Liriano v. Hobart Corp.*, 949 F. Supp. 171 (S.D.N.Y. 1996). In this products liability action, the plaintiff was injured when his hand was caught in a commercial meat grinder. *Id.* at 173. The plaintiff's expert was an engineer and safety consultant who testified that the meat grinder was defective by virtue of its in-

Until recently, the controversy over the scope of *Daubert* was particularly acute in products liability cases involving the expert mechanical engineer.[174] In these cases the question was-whether the engineer, relying on training or experience, may testify that a safer design is feasible based upon examination of the product? If *Daubert* was applied, the engineer's opinion would likely be excluded, unless the expert could show that he ran tests upon the product; that he actually made and tested the alternative safer design; and that he consulted the views of his peers.

The United States Supreme Court recently answered this question in *Kumho Tire Co. v. Carmichael*.[175] In *Kumho*, the trial judge excluded a tire expert's opinion that was based almost exclusively on skill-based examination of the allegedly defective tire, because the opinion failed the *Daubert* test.[176] The Eleventh Circuit, however, reversed the exclusion on the ground that the *Daubert* factors apply only to testimony based on the "application of scientific principles" and not to expert testimony based on "skill or experience-based observation."[177] This is the approach taken that had been follwed in the Second Circuit.[178] In *Kumho*, the United States Supreme Court determined that the *Daubert* factors for determining the admissibility of expert testimony should be applied to the testimony of engineers and other experts who are not scientists.[179] Therefore, *Daubert* applies to all expert testimony.[180] *Daubert*'s list of specific factors is illustrative and grants district courts broad latitude, which is reviewed by an abuse of discretion standard.[181]

It should also be noted that the Advisory Committee on the Federal Rules of Evidence has proposed an amendment to Federal Rule 702 which

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adequate warning. *Id.* at 176. His opinion, arguably, would not have met the *Daubert* criteria since he had not actually tested the machine. *Id.* His conclusion was based largely upon personal inspection. *Id.* Nevertheless, the expert testimony was admitted, and the court held that *Daubert* criteria did not govern. *Id.* at 178. Instead, the expert testimony was assessed under the traditional, liberal helpfulness standard of Federal Rule of Evidence 702. *Id.*; *see also* United States v. Starzecpyzel, 880 F. Supp. 1027, 1029 (S.D.N.Y. 1995) (holding that expert testimony from a forensic document examiner was admissible even though it would fail to qualify under *Daubert* standards). But many other federal courts have explicitly stated that *Daubert* applies to *all* expert testimony. *See* Watkins v. Telsmith, 121 F.3d 984, 990 (5th Cir. 1997).

174. *See* Pestel v. Vermeer Mfg. Co., 64 F.3d 382, 384-85 (8th Cir. 1995); Stanczyk v. Black & Decker, Inc., 836 F. Supp. 565, 567-68 (N.D. Ill. 1993).

175. 119 S. Ct. 1167 (1999).

176. Carmichael v. Samyung Tires, Inc., 923 F. Supp. 1514, 1520 (S.D. Ala. 1996).

177. Carmichael v. Samyung Tires Inc., 131 F.3d 1433, 1435 (11th Cir. 1997).

178. *See Starzecpyzel*, 880 F. Supp. at 1027; *Liriano*, 949 F. Supp. at 176.

179. 119 S. Ct. at 1173-74.

180. *Id.* at 1171.

181. *Id.* at 1174-76.

would apply *Daubert* criteria to all forms of expert testimony.[182] According to the committee note to the proposed amendment:

> The amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist.[183]

During the *Survey* period, the United States Supreme Court answered another *Daubert* question. What is the standard for appellate review of *Daubert* decisions excluding expert opinion? A district court's ruling on the admissibility of evidence is usually subject to appellate review on an "abuse of discretion" standard.[184] But in the last several years, two federal courts of appeal announced a more stringent "hard look" standard.[185] Thus it had been said that "because the Federal Rules of Evidence display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge's exclusion of expert testimony."[186] This "hard look" review standard was said to be appropriate when the trial judge's exercise of discretion excludes expert testimony and the ruling results in a grant of summary judgment or a directed verdict.[187] The United States Supreme Court rejected this approach in *General Electric Co. v. Joiner*.[188] Instead it held that "abuse of discretion," the standard ordinarily applicable to review of evidentiary rulings, is the proper standard to review a district court's decision to admit or to exclude expert scientific evidence.[189] The Court went on to hold that an appeals court in applying this standard "may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it."[190] In addition, it rejected the argument that,

182. FED. R. EVID. 702 (proposed advisory committee's note).

183. Committee Note to Proposed Amendment to FED. R. EVID. 702 as promulgated by the Standing Committee of the Judicial Conference's Committee on Rules of Practice and Procedure.

184. McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1042 (2d Cir. 1995).

185. Joiner v. General Elec. Co., 78 F.3d 524, 531-34 (11th Cir. 1996), *rev'd,* 522 U.S. 136 (1997); *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 749-50 (3d Cir. 1994).

186. *Joiner*, 78 F.3d at 529.

187. *In re Paoli*, 35 F.3d at 749-50.

188. 118 S. Ct. 512 (1997).

189. *Id.* at 514.

190. *Id.*

when the result of excluding the opinion leads to summary judgment against the proponent, a more searching standard of review is appropriate.[191]

Another significant United States Supreme Court decision involved polygraph evidence.[192] In the wake of the Supreme Court's earlier decision in *Daubert* several federal circuit courts have suggested that existing automatic bans on polygraph evidence should be re-examined.[193] The reasoning is that lie detectors, now in widespread use in industry, may well pass muster under *Daubert* criteria.[194] The argument is that the matter should be left to the discretion of the court and that per se rules of exclusion should be abandoned.[195] When it is the accused in a criminal case that is automatically precluded from using favorable lie detector results, a constitutional issue may be raised.[196] That was the situation in *United States v. Scheffer*.[197] Military Rule of Evidence 707(a) establishes a blanket prohibition on the admission of "the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination."[198] In *Scheffer*, defendant, a serviceman, was court-martialled for allegedly using drugs.[199] At his trial he was not allowed to produce polygraph results which supported his testimony that he did not knowingly ingest controlled substances.[200] On appeal from his conviction, defendant argued that under the authority of *Rock v. Arkansas*[201] the automatic ban violated his constitutional right to present a defense.[202] The Supreme Court disagreed and held that an evidentiary rule that prohibits admission of all polygraph evidence does not run afoul of the Sixth Amendment right to present a defense.[203] It concluded that a defendant's right to present evidence is subject to reasonable

191. *Id.* at 514-15.
192. United States v. Scheffer, 118 S. Ct. 1261, 1262 (1998).
193. *See* United States v. Cordoba, 104 F.3d 225, 227 (9th Cir. 1997); United States v. Posado, 57 F.3d 428, 436 (5th Cir. 1995).
194. *Cordoba*, 104 F.3d at 227.
195. *Id.*
196. *See* Rock v. Arkansas, 483 U.S. 44, 62 (holding that an evidence rule prohibiting defendant from testifying as to her hypnotically refreshed recollection of the murder of her children unconstitutionally infringed upon the accused's right to present a defense).
197. *Scheffer*, 118 S. Ct. at 1262 (1998).
198. *Id.* at 1263.
199. *Id.*
200. *Id.*
201. 483 U.S. at 44.
202. 44 M.J. 442, 445-46 (C.A.A.F. 1996).
203. *Scheffer*, 118 S. Ct. at 1269.

restrictions.[204] The per se exclusion under Military Rule of Evidence 707 was found to serve a legitimate interest of insuring that only reliable evidence is introduced.[205]

III. WITNESSES

A. Cross-Examination and Impeachment

It has long been true in New York that a witness may be impeached in the discretion of the court by a showing that the witness has been convicted of a crime.[206] The word "crime" includes misdemeanors as well as felonies.[207] Traffic offenses, however, are treated as not affecting the credibility of a witness and may not be used to impeach.[208] However, a plea of guilty, even in a traffic case, can be used as an admission against a party if it is relevant in a subsequent civil or criminal case.[209] So, for example, it was held in *Ando v. Woodbury* that a guilty plea to a traffic violation is admissible as proof of negligence in a subsequent civil action.[210] The court in *Ando* noted that the defendant who pled guilty is entitled to explain his plea so that the jury may consider what weight to give it.[211] What happens in that situation if the prior plea of guilty was withdrawn and vacated? May it still be admitted as an admission or to impeach the party in a subsequent civil action? In *People v. Spitaleri*, the New York Court of Appeals held that a criminal defendant's withdrawn plea of guilty could not be used against him in a subsequent criminal trial.[212] The court stated that a plea that is "allowed to be withdrawn is out of the case forever and for all purposes."[213] The decision was based upon fundamental fairness grounds. If the prosecution were allowed to use a defendant's previously withdrawn plea of guilty at a later trial, it would in effect force the accused to take the stand to explain. But, as the Court has now made clear, the same concern does not arise when a withdrawn plea is offered in a subsequent civil case.

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204. *Id.* at 1264.
205. *Id.*
206. N.Y. CPLR 4513 (McKinney 1992); N.Y. CPL 60.40(1) (McKinney 1992).
207. *See* N.Y. PENAL LAW § 10.00(6) (McKinney 1997).
208. N.Y. VEH. & TRAF. LAW § 155 (McKinney 1996) (stating that "[a] traffic infraction is not a crime . . . and shall not affect or impair the credibility as a witness . . . of any person").
209. Ando v. Woodberry, 8 N.Y.2d 165, 168, 168 N.E.2d 520, 521, 203 N.Y.S.2d 74, 76 (1960).
210. *Id.* at 167, 168 N.E.2d at 521, 203 N.Y.S.2d at 76.
211. *Id.* at 171, 168 N.E.2d at 523, 203 N.Y.S.2d at 78.
212. 9 N.Y.2d 168, 173, 173 N.E.2d 35, 37, 212 N.Y.S.2d 53, 56 (1961).
213. *Id.*

The issue was presented in *Cohens v. Hess*, decided by the New York Court of Appeals late in this *Survey* period.[214] Plaintiffs brought a personal injury action against defendant arising out of an automobile accident.[215] At the time of the collision, the sole traffic control device at the intersection was a stop sign that faced the defendant.[216] Defendant was charged with a traffic violation and two weeks later he pleaded guilty in a city court to failure to obey a traffic control device.[217] Three years after entry of this plea and about six months after plaintiff's personal injury action was commenced, defendant apparently realized that in light of the civil action now pending, his decision to plead to the traffic violation was unwise.[218] Without the knowledge of plaintiff, defendant returned to city court and moved to vacate the judgment of conviction and to withdraw his previously entered plea.[219] Defendant's motion was not opposed by the local district attorney and the court permitted defendant to withdraw his plea and the conviction was vacated.[220] At the trial of the civil action, defendant testified that he stopped at the stop sign before entering the intersection.[221] On cross-examination, plaintiff's counsel attempted to impeach by confronting defendant with the earlier entry of his plea.[222] The trial court refused to allow it on the ground that any use of the plea was improper because it had been vacated and withdrawn.[223] The appellate division majority affirmed,[224] relying on *People v. Spitaleri*,[225] a decision which the dissent insisted was limited to criminal cases and inapplicable to the circumstances here.[226]

The Court of Appeals reversed and held that a traffic offense guilty plea, even though vacated, is admissible in a subsequent civil action.[227] The Court noted that the sole basis for allowing withdrawal of the plea was that defendant at the time was not represented by counsel.[228] Since, however, defendant was charged only with a traffic infraction, he was not, as a

214. 92 N.Y.2d 511, 512, 705 N.E.2d 1202, 1203, 683 N.Y.S.2d 161, 162 (1998).
215. *Id.* at 512, 705 N.E.2d at 1203, 683 N.Y.S.2d at 162.
216. *Id.* at 512-13, 705 N.E.2d at 1203, 683 N.Y.S.2d at 162.
217. *Id.* at 513, 705 N.E.2d at 1203, 683 N.Y.S.2d at 162.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. 248 A.D.2d 954, 955, 670 N.Y.S.2d 287, 288 (4th Dep't 1998).
225. 9 N.Y.2d 168, 173, 173 N.E.2d 35, 37, 212 N.Y.S.2d 53, 56 (1961).
226. 248 A.D.2d 954, 955, 670 N.Y.S.2d at 288-89.
227. 92 N.Y.2d at 511, 705 N.E.2d at 1202, 683 N.Y.S.2d at 161.
228. *Id.* at 514, 705 N.E.2d at 1204, 683 N.Y.S.2d at 163.

matter of right, entitled to representation by an attorney.[229] The original plea was not the product of coercion, misrepresentation or any constitutionally based defect.[230] The Court of Appeals decision was based upon three conclusions: (1) the vacator of defendant's plea was not based upon any violation of due process; (2) the original plea was relevant to impeach and contradict the testimony of defendant at the civil trial; and (3) the *Spitaleri* fairness concern that an accused might be forced to testify in a later criminal case was inapplicable in this civil case.[231]

In *North Carolina v. Alford*, the United States Supreme Court held that a defendant may enter a plea of guilty to a criminal charge without conceding guilt.[232] In other words, an accused may be unwilling or unable to admit his participation in the acts constituting the crime but still intelligently conclude that his interests require entry of a guilty plea. The desire to enter a guilty plea accompanied by protestations of innocence may, of course, require further inquiry by the trial court to ensure that the guilty plea truly "represents a voluntary and intelligent choice among alternative courses of action open to the defendant."[233] The point is that "while a guilty plea ordinarily constitutes an admission of criminal conduct, an express admission of guilt is not a constitutional requisite to the imposition of criminal penalty."[234] "*Alford* pleas," as they are commonly called, are accepted in New York.[235] In *People v. Francabondera*, defendant was injured during a shootout which left him unable to recall the criminal activity.[236] His voluntary decision to plead guilty was properly accepted even though his amnesia prevented a confession of guilt.[237] Similarly, in *People v. Friedman*, the Court of Appeals upheld defendant's guilty plea even though he failed to specifically admit the criminal act.[238]

In *People v. Miller* the New York Court of Appeals recently confronted the question of whether convictions resulting from an *Alford* plea may be used to impeach defendant's credibility just like any other conviction.[239] Here the defendant's testimony in a trial for murder and rape was

229. *Id.*
230. *Id.*
231. 92 N.Y.2d at 514-15, 705 N.E.2d at 1204-05, 683 N.Y.S.2d at 163-64.
232. 400 U.S. 25, 38-39 (1970).
233. *Id.* at 31.
234. *Id.* at 37.
235. People v. Francabondera, 33 N.Y.2d 429, 433-35, 310 N.E.2d 292, 293-95, 354 N.Y.S.2d 609, 612-13 (1974).
236. *Id.*
237. *Id.* at 434, 310 N.E.2d at 294, 354 N.Y.S.2d at 612.
238. 39 N.Y.2d 463, 467, 348 N.E.2d 883, 886, 384 N.Y.S.2d 408, 410 (1976).
239. 91 N.Y.2d 372, 377, 694 N.E.2d 61, 65, 670 N.Y.S.2d 978, 981 (1998).

impeached by a prior felony conviction entered in Virginia.[240] This conviction arose from defendant's *Alford* plea in the Virginia court.[241] In *Miller* the New York Court of Appeals concluded "that a conviction premised upon an *Alford* plea may generally be used for the same purposes as any other conviction."[242] It follows, therefore, that a defendant may be properly cross-examined for impeachment purposes regardless of the fact that conviction arose from an *Alford* plea.

New York has long permitted the credibility of a witness to be impeached by cross-examination about "any immoral, vicious or criminal act" which may affect the character of the witness and show him or her to be unworthy of belief.[243] Interrogation is not limited to conduct directly probative of truthfulness as long as "the inquiry has some tendency to show moral turpitude."[244] An abuse of this impeachment technique was recently explored by the Appellate Division, First Department, in *People v. Crawford*.[245] In this case defendant was charged with possession of cocaine allegedly purchased from two undercover police officers who testified at trial.[246] Defendant called one, Linda Trafton, as an alibi witness.[247] During her cross-examination, the prosecutor asked Trafton whether she had ever gone by the name of 'Williams' and whether she had ever engaged in prostitution.[248] Then, while holding a long 'rap sheet' in his hand, the prosecutor asked Trafton whether she had in the past used thirteen specific aliases.[249] The witness responded negatively to all these questions.[250] It turned out that the name on the 'rap sheet' was 'Linda Williams,' not 'Trafton.'[251] When called upon to explain, the prosecutor stated that he thought the witness had identified herself when being sworn in as "Linda Ann Christina Williams Trafton."[252] When it was revealed that the stenographic transcript did not bear out this excuse, the trial court told the jury

240. *Id.* at 376, 694 N.E.2d at 66, 670 N.Y.S.2d at 980.
241. *Id.*
242. *Id.* at 378, 694 N.E.2d at 67, 670 N.Y.S.2d at 981.
243. People v. Sorge, 301 N.Y. 198, 200, 93 N.E.2d 637, 638 (1950); MARTIN, *supra* note 1, § 6.10.2.
244. Badr v. Hogan, 75 N.Y.2d 629, 634, 554 N.E.2d 890, 892, 555 N.Y.S.2d 249, 251 (1990).
245. 244 A.D.2d ___, 683 N.Y.S.2d 216 (1st Dep't 1998).
246. *Id.* at ___, 683 N.Y.S.2d at 217.
247. *Id.* at ___, 683 N.Y.S.2d at 217.
248. *Id.* at ___, 683 N.Y.S.2d at 217.
249. *Id.* at ___, 683 N.Y.S.2d at 217.
250. *Id.* at ___, 683 N.Y.S.2d at 217.
251. *Id.* at ___, 683 N.Y.S.2d at 217.
252. *Id.* at ___, 683 N.Y.S.2d at 217.

merely that the rap sheet "was not evidence."[253] Over defense counsel's objection and motion for a mistrial, the court refused to instruct the jury to disregard all the questions about prostitution and use of aliases that related to the 'rap sheet.'[254] On appeal from defendant's conviction, defendant argued that the court's refusal to give a curative instruction regarding the improper cross-examination deprived her of a fair trial.[255]

The appellate division agreed and reversed the conviction.[256] The court made clear that when prosecutor fails to demonstrate a good faith basis for the questioning, or that the allegations have a reasonable basis in fact, it is error for a trial court to permit such questioning or to refuse to strike it from the jury's consideration.[257] A reasonable basis for questioning, requires something more than a 'hunch.'[258] Here, the prosecutor's inflammatory allegations of prior immoral and criminal activity were based on a "flimsy predicate."[259]

Although a criminal defendant who testifies may generally be impeached like any witness in any case, impeachment of an accused by prior conviction involves special concerns.[260] These include a fear that the jury will not be able to properly limit the effect of the prior conviction to the issue of credibility, but may instead seek to punish the defendant for past crimes. There is also concern that the danger of prejudice from use of prior convictions may deter the accused from taking the stand to testify on his own behalf. Therefore, in *People v. Sandoval*, the Court of Appeals approved a procedure whereby the court, in advance of trial, will determine "whether the prejudicial effect of impeachment testimony far outweighs the probative worth of the evidence on the issue of credibility."[261] Although *Sandoval* identified factors to be considered in this balancing process, "there are no *per se* rules requiring preclusion because of the age, or the nature or number of a defendant's prior crimes."[262] It is also clear that the burden is on the defendant to show that use of prior convictions "far outweigh[s]" probative value and that appellate review of *Sandoval* rulings

253. *Id.* at ___, 683 N.Y.S.2d at 217.
254. *Id.* at ___, 683 N.Y.S.2d at 217.
255. *Id.* at ___, 683 N.Y.S.2d at 217.
256. *Id.* at ___, 683 N.Y.S.2d at 217.
257. *Id.* at ___, 683 N.Y.S.2d at 218.
258. *Id.* at ___, 683 N.Y.S.2d at 218.
259. *Id.* at ___, 683 N.Y.S.2d at 217.
260. MARTIN, *supra* note 1, § 6.10.4; People v. Sorge, 301 N.Y. 198, 201-02, 93 N.E.2d 637, 639-40 (1950).
261. 34 N.Y.2d 371, 376, 314 N.E.2d 413, 417, 357 N.Y.S.2d 849, 855 (1974).
262. People v. Walker, 83 N.Y.2d 455, 459, 633 N.E.2d 472, 474, 611 N.Y.S.2d 118, 120 (1994).

under an abuse of discretion standard is very deferential to the trial court.[263] As a result, the New York experience is that prior convictions are commonly ruled admissible to impeach a criminal defendant who takes the stand and appellate courts rarely interfere.[264] But it does occasionally happen and *People v. Young* is a rare instance of an appellate reversal.[265] In this narcotics prosecution, defendant was a crack cocaine addict, having used the drug daily for almost a dozen years.[266] His criminal record started in 1970 with a conviction for petit larceny and continued through 1990 with a conviction for criminal possession of a controlled substance.[267] At defendant's *Sandoval* hearing, the trial court allowed use of almost all of defendant's prior record dating back eighteen years.[268] The prosecutor took full advantage of the ruling devoting a full one-third of his cross-examination of defendant to his criminal record.[269] As condoned by the trial court, the questioning elicited all the details of the prior convictions including original charges, plea bargains, sentences imposed, probation violations, and even the fact that a bench warrant was issued because defendant "failed to show up."[270] This, the Appellate Division, Third Department held, was an abuse of discretion.[271] It found that the trial court failed to engage in the required "sensitive, informed reconciliation of the interests of the People and the rights of the defendant."[272]

B. The Missing Witness Charge

Every *Survey* period seems to provide at least one interesting case involving the appropriateness of the missing witness instruction. This *Survey* year is no exception.

The uncalled witness rule provides that if a party has it peculiarly within his power to produce a witness whose testimony would elucidate a material transaction, the fact that he does not call the witness creates a permissible inference that the testimony, if produced, would be unfavor-

263. *Sandoval*, 34 N.Y.2d at 378, 314 N.E.2d at 418, 357 N.Y.S.2d at 856.

264. *See e.g.*, People v. Brown, 249 A.D.2d 835, 837, 673 N.Y.S.2d 216, 219 (3d Dep't 1998); People v. Strasser, 249 A.D.2d 781, 784, 671 N.Y.S.2d 873, 876 (3d Dep't 1998); People v. Bell, 249 A.D.2d 777, 777, 671 N.Y.S.2d 878, 879 (3d Dep't 1998); People v. Redcross, 246 A.D.2d 838, 839-40, 668 N.Y.S.2d 270, 271-72 (3d Dep't 1998).

265. 249 A.D.2d 576, 582, 670 N.Y.S.2d 940, 944 (3d Dep't 1998).

266. *Id.* at 579, 670 N.Y.S.2d at 942.

267. *Id.*, 670 N.Y.S.2d at 942.

268. *Id.*, 670 N.Y.S.2d at 942-43.

269. *Id.* at 580, 670 N.Y.S.2d at 943.

270. *Id.*, 670 N.Y.S.2d at 943.

271. *Id.*, 670 N.Y.S.2d at 940.

272. *Id.* at 582, 670 N.Y.S.2d at 944.

able.[273] For over a century, this common law inference has been followed in federal and most state courts. It is the law in New York.[274] When it applies, this inference results in a missing witness charge instructing the jury that it can infer that the testimony of the missing person would be adverse.[275] In order to justify a missing witness instruction, the uncalled witness must be "under the control" of the party against whom the charge is given.[276] As the Court of Appeals stated in *People v. Gonzalez,* a "witness is said to be in the 'control' of the party to whom he [or she] is favorably disposed."[277] This "under the control of the party" requirement does not appear to be much of a restriction in New York. In last year's *Survey*, for example, it was noted that an examining physician was deemed to be under the control of one of the parties even though most courts would expect an expert witness to be independent and, in most cases, equally available to all parties.[278]

Another example is this year's divided appellate division decision in *People v. Keen.*[279] Here, the defendant was convicted of a depraved indifference murder as a result of a shooting in a dispute over entry without payment into a social club.[280] The defendant denied pulling the trigger and ultimately testified that he was fifty feet away when the shooting occurred arguing with his girlfriend, Charlotte Jordan, over her alleged infidelity.[281] Ms. Jordan, with whom the defendant was living and with whom he fathered a child, gave a statement supporting this version shortly after defendant's arrest.[282] However, by the time of trial a year and a half later, the defendant and Jordan were no longer intimate and their relationship had soured from intimacy to hostility.[283] The defendant had to subpoena her at trial where, at an ex parte hearing before the judge, she repudiated her prior statement and stated that she would have to read the statements of other witnesses in order to refresh her memory as to what had happened.[284] Ac-

273. Graves v. United States, 150 U.S. 118, 121 (1893).

274. People v. Macana, 84 N.Y.2d 173, 177, 639 N.E.2d 13, 14, 615 N.Y.S.2d 656, 657 (1994).

275. *Id.*

276. People v. Gonzalez, 68 N.Y.2d 424, 431, 502 N.E.2d 583, 588, 509 N.Y.S.2d 796, 801 (1986); Jackson v. County of Sullivan, 232 A.D.2d 954, 955, 648 N.Y.S.2d 808, 809 (3d Dep't 1996).

277. 68 N.Y.2d at 429, 502 N.E.2d at 587, 509 N.Y.S.2d at 800.

278. *See* Leahy v. Allen, 221 A.D.2d 88, 91, 644 N.Y.S.2d 388, 391 (3d Dep't 1996).

279. 1999 WL 93797, at *1 (1st Dep't Feb. 25, 1999).

280. *Id.* at *1.

281. *Id.* at *4.

282. *Id.* at *2.

283. *Id.* at *4.

284. *Id.*

cordingly, the defendant declined to call her as a witness and the people requested a missing witness instruction.[285] The defendant objected, arguing that Jordan was not under defendant's control and was affirmatively hostile.[286] The defendant further stated that the relationship had terminated sixteen months earlier and that Jordan now had a new boyfriend.[287] The trial court granted the prosecution's request and gave the missing witness charge.[288] The First Department affirmed.[289] The dissent, however, believed that the control test was not met.[290] He questioned the majority's implicit assumption that Jordan's first exculpatory version of the incident was false and that her later recantation, adverse to the defendant, was true.[291] If one assumes the reverse, then the unfairness of the missing witness charge is apparent. The dissent in reaching his conclusion reasoned that

> no defense counsel in a criminal case should be confronted with the Hobson's choice offered him here: either to proffer the testimony of a witness he believes to be perjured (which would be wholly adverse to his client's position, and thus in violation of two fundamental canons of ethics), or to refrain from this course and accept the heavy sanction (in the context of this case) of an adverse witness charge.[292]

The majority, on the other hand, was satisfied to have the control test turn on whether the facts indicate that " it would be natural to expect defendant to call Jordan to corroborate his sworn testimony."[293]

C. Sequestration of Witnesses

Under New York law, a motion for the exclusion of witnesses in order to keep witnesses outside the courtroom while others are testifying, is addressed to the discretion of the trial court.[294] Although there is no New York statute covering sequestration of witnesses, case law states that ordinarily exclusion should not be denied.[295] *People v. Medure* raises the

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285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at *3.
290. *Id.* at *4-*5 (Wallach, J. dissenting).
291. *Id.* at *5.
292. *Id.*
293. *Id.* at *2.
294. Levine v. Levine, 56 N.Y.2d 42, 49, 436 N.E.2d 476, 479, 451 N.Y.S.2d 26, 29 (1982).
295. People v. Felder, 39 A.D.2d 373, 379-80, 334 N.Y.S.2d 992, 999 (2d Dep't 1972), *aff'd*, 32 N.Y.2d 747, 297 N.E.2d 522, 344 N.Y.S.2d 643 (1973).

question of whether the expert witness of a party should be excluded.[296] The issue presented in this gambling prosecution was whether equipment installed on defendants' premises were eavesdropping devices requiring a warrant on probable cause or a pen register requiring only an order based on reasonable suspicion. This technological question required expert testimony.[297] Defendants moved to permit their expert to remain in the courtroom during testimony by the People's expert.[298]

Were this proceeding in federal court, there would be little problem. The Federal Rules of Evidence provide that a fact witness "must" be excluded on the request of a party as a matter of right.[299] But the rule goes on to state "a person whose presence is shown . . . to be essential" may not be excluded.[300] Federal case law supports a conclusion that an expert witness is a person who should not be excluded under the rule.[301] This is especially true since the federal rules permit an expert to base an opinion on facts or data obtained at the hearing.[302] In other words, an expert can base his opinion on the testimony of other witnesses and, therefore, must be present when they testify. Relying in part on federal precedent and in part on New York case dicta, the court in *Medure* held that the defendant's expert was essential to advise in connection with highly specialized matters, to assist in preparation for cross-examination of the state's expert, and to provide the court with opinion testimony based upon the People's evidence.[303] Accordingly, the defense expert could not be excluded.[304]

D. Jury Conduct: Note-Taking

For many years judges did not allow note-taking by jurors because of the fear that jurors taking notes would dominate jury deliberation. Today, in New York, the practice of allowing note-taking has been approved by all four departments of the appellate division, as well as jury reform advocates and many legal scholars.[305] A large majority of other jurisdictions have

296. 178 Misc. 2d 878, 880, 683 N.Y.S.2d 697, 699 (Sup. Ct., Bronx Co. 1998).

297. *Id.*

298. *Id.*, 683 N.Y.S.2d at 699.

299. At the request of a party the court *shall* order witnesses excluded so that they cannot hear the testimony of other witnesses. FED. R. EVID. 615 (emphasis added).

300. FED. R. EVID. 615(3).

301. United States v. Kosko, 870 F.2d 162, 163-64 (4th Cir. 1989); Morvant v. Constr. Aggregates Corp., 570 F.2d 626, 630 (6th Cir. 1978).

302. FED. R. EVID. 703.

303. 178 Misc. 2d at 879-80, 683 N.Y.S.2d at 698-99.

304. *Id.*

305. People v. Hues, 92 N.Y.2d 413, 417, 704 N.E.2d 546, 548-49, 681 N.Y.S.2d 779, 781 (1998); People v. Dexheimer, 214 A.D.2d 898, 902, 625 N.Y.S.2d 719, 722 (3d Dep't 1995); People v. Schiliro, 179 A.D.2d 693, 694, 578 N.Y.S.2d 259, 260 (2d Dep't 1992);

held that juror note-taking is a matter of trial court discretion.[306] To this growing consensus, we may now add the New York Court of Appeals.

In *People v. Hues*, a prosecution for possession and sale of cocaine, the trial court gave a preliminary instruction that the jurors were permitted but not required to take notes.[307] The judge's charge permitting note-taking was given sua sponte without a prior jury request.[308] The jury was also given precautionary instructions regarding the use of notes during the trial and later deliberations.[309] Following conviction, defendant argued unsuccessfully in the appellate division that the court's sua sponte instruction without prior request led the jurors to believe they were required to take notes and that they would unduly rely on them in the jury room.[310] The Court of Appeals rejected this contention and affirmed the conviction.[311] The Court held that "a trial court while not obligated to do so has the discretion to permit note-taking by jurors during a trial" and that the court may, on its own motion "authorize such conduct even in the absence of a prior request by jurors."[312]

At the same time the Court of Appeals required that, in view of the potential perils of note-taking, cautionary instructions must be given to the jurors that (1) they should not allow note-taking to become a distraction; (2) that notes are only to aid memory and are not superior to their independent recollection; (3) that jurors who do not take notes should rely on their recollection of the evidence and not be influenced by the fact that another juror has taken notes; (4) that notes are only for the juror's personal use in refreshing recollection of the evidence; (5) that if there is a discrepancy between a juror's recollection of the evidence and the juror's notes, the jury should request a read back of the record and that the court's transcript prevails over a juror's notes; and (6) that notes are not a substitute for the official record or for the governing principles of law as enunciated by the trial court.[313]

People v. Vaccarella, 177 A.D.2d 990, 991, 578 N.Y.S.2d 11, 12 (4th Dep't 1991); People v. Tucker, 153 A.D.2d 164, 171, 550 N.Y.S.2d 1, 5 (1st Dep't 1990).

306. *Hues*, 92 N.Y.2d at 417, 704 N.E.2d at 548-49, 681 N.Y.S.2d at 781. See *id.* note 3 for a listing of cases on point.

307. *Id.* at 413, 704 N.E.2d at 546, 681 N.Y.S.2d at 779.

308. *Id.* at 414-16, 704 N.E.2d at 547-48, 681 N.Y.S.2d at 780-81.

309. *Id.*

310. *Id.* at 416, 704 N.E.2d at 547-48, 681 N.Y.S.2d at 780-81.

311. *Id.* at 419, 704 N.E.2d at 548-50, 681 N.Y.S.2d at 780-82.

312. *Id.*, 704 N.E.2d at 548-50, 681 N.Y.S.2d at 782.

313. *Id.*, 704 N.E.2d at 549-50, 681 N.Y.S.2d at 782-83.

E. Competency

Section 60.20(2) of the New York CPL provides that "[a] child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of the oath."[314] Even if the child is not sworn, this rebuttable presumption of incompetence may be overcome if the child demonstrates to the trial judge sufficient intelligence and capacity to justify reception of his testimony and some conception of the obligations of an oath and the consequences of giving false testimony.[315] But, if the child's unsworn testimony is received, then CPL 60.20(3) provides that a defendant may not be convicted solely upon this unsworn testimony of a complaining witness.[316] In other words, the unsworn testimony must be corroborated by "evidence tending to establish the crime and connecting defendant with commission."[317] The trial court's determination on the competency of child witnesses will not usually be disturbed unless it is clearly erroneous.[318] That is because the trial judge is uniquely positioned to observe the witness's maturity and demeanor. Nevertheless, reversal did occur in the recent decision of *People v. Cordero*.[319]

In *Cordero* defendant was convicted of sodomizing his six-year-old nephew.[320] Prior to opening statements, the court questioned the complaining witness outside the presence of the jury.[321] It determined that it would not permit the child to be sworn but would allow him to give unsworn testimony.[322] The jury returned a guilty verdict but the trial court set it aside finding that the child's unsworn testimony was not adequately corroborated.[323] On appeal by the People, the Appellate Division, First Department unanimously reversed and reinstated defendant's conviction.[324]

The appellate court concluded first that the child possessed sufficient intelligence and capacity to be sworn as a witness.[325] Accordingly, he should have been sworn and the trial court's determination to the contrary

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314. N.Y. CPL 60.20 (McKinney 1992).
315. People v. Nisoff, 36 N.Y.2d 560, 563, 330 N.E.2d 638, 640, 369 N.Y.S.2d 686, 689 (1975); People v. Parks, 41 N.Y.2d 36, 45-46, 359 N.E.2d 358, 359, 390 N.Y.S.2d 848, 856 (1976).
316. N.Y. CPL 60.20(3).
317. *Id.*
318. *Parks*, 41 N.Y.2d at 46, 359 N.E.2d at 366, 390 N.Y.S.2d at 856.
319. ___ A.D.2d ___, ___, 684 N.Y.S.2d 192, 197 (1st Dep't 1999).
320. *Id.* at ___, 684 N.Y.S.2d at 193.
321. *Id.* at ___, 684 N.Y.S.2d at 194.
322. *Id.* at ___, 684 N.Y.S.2d at 195.
323. *Id.* at ___, 684 N.Y.S.2d at 194.
324. *Id.* at ___, 684 N.Y.S.2d at 195.
325. *Id.* at ___, 684 N.Y.S.2d at 195.

constituted an improvident exercise of discretion.[326] Next the appellate division held that even if the complainant were not competent to be sworn, the evidence corroborating the unsworn testimony was sufficient to support conviction.[327] Corroborating testimony in the record included the complainant's prompt outcries to his brothers and mother after the incident, defendant's statement to the police that he was with the child at the time of the assault, recovery by the police of the can of oil used during the attack, and evidence that the child's behavior changed after the incident.[328]

IV. PRIVILEGES

A. Parent-Child Privilege

Few New York State privilege decisions were noteworthy during this survey period. Significant decisions in the area of privileges were largely limited to federal cases. However, one interesting lower state court case involved the parent-child testimonial privilege.

New York has not recognized by statute a privilege between child and parent.[329] Nevertheless, there is case authority recognizing a common law child-parent privilege under limited circumstances.[330] The justification offered for such a privilege is that fostering of the confidential relationship is necessary to the child's development. As one New York court put it "[i]t is . . . critical to a child's emotional development that he know that he may explore his problems in an atmosphere of trust and understanding without fear that his confidences will be later revealed to others."[331] Thus, the court in *Matter of A&M* held that "communications made by a *minor* child to his parents within the context of a family relationship may, under some circumstances, lie within the 'private realm of family life which the state cannot enter.'"[332]

This recognition was expanded in one case. *People v. Fitzgerald*, held that statements made by a twenty-three-year-old emancipated defendant to his father were within the privilege.[333] The *Fitzgerald* court insisted that the child-parent relationship must be protected throughout the life of the

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326. *Id.* at ___, 684 N.Y.S.2d at 195.
327. *Id.* at ___, 684 N.Y.S.2d at 196.
328. *Id.* at ___, 684 N.Y.S.2d at 196.
329. Matter of Mark G., 65 A.D.2d 917, 917, 410 N.Y.2d 464, 464 (4th Dep't 1978).
330. Matter of A&M, 61 A.D.2d 426, 435, 403 N.Y.S.2d 375, 381 (4th Dep't 1978).
331. *Id.* at 432, 403 N.Y.S.2d at 380.
332. 61 A.D.2d 426, 435, 403 N.Y.S.2d 375, 381 (4th Dep't 1978) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (emphasis added)).
333. 101 Misc. 2d 712, 720, 422 N.Y.S.2d 309, 314 (Westchester County Ct. 1979).

parties and should not be limited by the age of either party.[334] However, the bulk of the decisions in New York have limited the privilege to situations where a *minor* child is under arrest for a serious crime and seeks guidance from a parent.[335]

During the *Survey* period the Erie County Supreme Court decided *People v. Hilligas*.[336] Defendant, the twenty-eight-year-old self-supporting emancipated son, was arrested for murder and held for grand jury action.[337] The People subpoenaed defendant's mother to testify before the grand jury but she refused to answer questions about conversations she had with her son following the alleged homicide on the ground of child-parent privilege.[338] The People's motion to compel the mother to testify was granted.[339] Defendant argued that the court should follow the *Fitzgerald* decision and expand the privilege to include an adult child.[340] The court in *Hillegas* declined to follow *Fitzgerald*.[341] It reasoned that "once a child reaches adulthood, the nature of the relationship between child and parent undergoes such a significant change that it no longer outweighs the State's interest in investigating serious crimes."[342]

B. Federal Attorney-Client Privilege

With one exception, it was not a good year for the survival or expansion of federal privileges. In particular, the White House suffered a series of defeats in controversies with the Office of Independent Counsel. Federal Court of Appeals decisions held that the attorney-client privilege of confidentiality does not extend to conversations between the executive officers and government attorneys and that the secret service officers were not covered by a so-called 'protective-function privilege.'[343] These decisions held that neither government attorneys nor secret service personnel could withhold information relating to a federal criminal offense.

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334. *Id.* at 718-20, 422 N.Y.S.2d at 313-14.

335. People v. Edwards, 135 A.D.2d 556, 559, 521 N.Y.S.2d 778, 779 (2d Dep't 1987); People v. Tesh, 124 A.D.2d 843, 844, 508 N.Y.S.2d 560, 561 (2d Dep't 1986); People v. Harrell, 87 A.D.2d 21, 27, 450 N.Y.S.2d 501, 505 (2d Dep't 1982), *aff'd*, 59 N.Y.2d 620, 449 N.E.2d 1263, 463 N.Y.S.2d 185 (1983).

336. 175 Misc. 2d 842, 670 N.Y.S.2d 744 (Sup. Ct., Erie Co. 1998).

337. *Id.* at 843, 670 N.Y.S.2d at 745.

338. *Id.* at 842-43, 670 N.Y.S.2d at 745.

339. *Id.* at 843, 670 N.Y.S.2d at 745.

340. *Id.* at 845, 670 N.Y.S.2d at 747.

341. *Id.* at 846, 670 N.Y.S.2d at 747.

342. *Id.*

343. *In re* Lindsey, 148 F.3d 1100, 1114 (D.C. Cir. 1998); *In re* Sealed Case, 148 F.3d 1079, 1088 (D.C. Cir. 1998).

The one victory for privilege was the United States Supreme Court decision in *Swindler & Berlin v. United States* involving the federal attorney-client privilege.[344] During the investigation of the White House travel office firings, Deputy White House Counsel Vincent Foster consulted his personal attorney who took handwritten notes.[345] Nine days later, Foster committed suicide.[346] Later, the Independent Counsel began a separate investigation into whether crimes were committed during prior 'Travelgate' inquiries.[347] Grand jury subpoenas were issued for Foster's attorney's notes.[348] This directly presented a single important question. Does the attorney-client privilege survive the death of the client, when the communication is sought in a criminal investigation? In a six-to-three decision the Supreme Court held that the privilege does survive and that the attorney's notes were protected.[349]

The Court reasoned that a client's knowledge that confidences will be protected even after death encourages the client to communicate fully and frankly with counsel and, thus, accomplishes the goal of the privilege.[350] The Court acknowledged that a client's fear of disclosure and the consequent withholding of information may be reduced if disclosure is limited to posthumous disclosure in a criminal context.[351] Nevertheless, a client's fear, said the Court, does not vanish altogether: "Clients may be concerned about reputation, civil liability, or possible harm to friends or family."[352] The Court declined to create an exception in situations where the information is important to a *criminal* investigation, finding no basis for creating a civil-criminal distinction in applicability of the privilege.[353] Finally, the Court did concede that "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege."[354] In other words, privileged communications could lose their protection after the client's death if disclosure was necessary to prevent an innocent accused from being convicted of a crime.

One Second Circuit decision rejected an attempt to extend the attorney-client privilege. The Court held that the attorney-client protection does

344. 118 S. Ct. 2081, 2081 (1998).
345. *Id.* at 2082.
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.* at 2088.
350. Id. at 2084 (citing Upjohn v. United States, 449 U.S. 383, 389 (1981)).
351. *Id.* at 2086.
352. *Id.*
353. *Id.* at 2087.
354. *Id.* at 2087 n.3.

not shield conversations between an attorney and an investment banker even though the conversations were intended to help the attorney advise his client about a proposed deal with the banker.[355] *United States v. Ackert* was a tax summons enforcement proceeding in which the IRS sought to question the banker.[356] The Second Circuit panel noted that the privilege covers communications between a client and an attorney, not an attorney and a third party.[357] It explained that "a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's ability to represent the client."[358]

Herrick Co. v. Vetta explores the impact that designating an attorney as a testifying expert witness can have on the attorney-client privilege under federal law.[359] It may result in waiver. In *Herrick*, a law firm was sued for allegedly breaching an attorney-client relationship that existed between plaintiff and the law firm.[360] A prominent law professor, a leading authority on legal ethics, had in the past provided advice on professional responsibility to the law firm on other matters.[361] This advice would normally be shielded from disclosure by the attorney-client privilege or the work product doctrine. In this action, however, the defendant law firm designated the law professor as its expert witness to testify that no attorney-client relationship existed between plaintiffs and defendant.[362] Plaintiffs sought to compel discovery of documents from the law professor's files regarding prior advice given by the expert to the defendant.[363] The court held that by electing to name the law professor as its expert trial witness, the law firm waived both the attorney-client privilege and work product protection.[364] The next question considered was the scope of the waiver.[365] The law firm argued that waiver extends only to documents considered by the expert in forming his opinions.[366] The court rejected this limitation.[367] It is true that Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure provides for mandatory disclosure of "data or other information considered by the witness

355. United States v. Ackert, 169 F.3d 136, 138 (2d Cir. 1999).
356. *Id.*
357. *Id.* at 139.
358. *Id.*
359. No. 94 C.V. 0905, 1998 WL 637468, at *1 (S.D.N.Y. 1998).
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.* at *2.
366. *Id.*
367. *Id.*

in forming the opinions."[368] But, said the court, that provision is not the outer limit of discovery.[369] By designating the law professor as its testifying expert, the defendant firm opened the door to discovery which covers documents other than those directly considered by the expert in forming opinions.[370] The court concluded that by choosing to use the professor's expertise, the firm had turned the prior advice it received into "matter not privileged, which is relevant to the subject matter involved in the pending action" and which is discoverable under Rule 26(b)(1) of the Federal Rules of Civil Procedure.[371] Otherwise, the firm could use the professor's "status as an expert on legal ethics as both sword and a shield, for the very status which grants his testimony weight with the jury would prevent his testimony from being thoroughly cross-examined."[372]

C. Federal Journalist Privilege

Almost thirty years ago in *Branzburg v. Hayes*, the United States Supreme Court recognized that "news gathering is not without its First Amendment protections."[373] Nevertheless, the Court held that on the facts of that case there was no privilege because "the public interest in law enforcement and in ensuring effective grand jury proceedings" was sufficient to override the 'uncertain' burden on news gathering.[374] Since then, the Second Circuit has recognized a qualified privilege protecting the journalist's confidential sources.[375] The basis for such a privilege was stated in *Baker v. F&F Investment*:[376]

> Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis . . . . The deterrent effect such disclosure is likely to have upon future 'undercover' investigative reporting . . . threatens freedom of the press and the public's need to be informed.[377]

Thereafter, in *In re Petroleum Products Antitrust Litigation*, the Federal Court of Appeals for the Second Circuit adopted a three-part test in order to preserve the confidentiality of journalists' sources.[378] Disclosure

368. *Id.*
369. *Id.*
370. *Id.*
371. *Id.* at *3.
372. *Id.*
373. 408 U.S. 665, 707 (1972).
374. *Id.* at 690-91.
375. *See* Baker v. F&F Inv., 470 F.2d. 778, 785 (2d Cir. 1972).
376. *Id.*
377. *Id.* at 782.
378. 680 F.2d 5, 7 (2d Cir. 1982).

may be ordered only upon a clear and specific showing that the information is (1) highly material and relevant, (2) necessary or critical to maintenance of the claim and (3) not obtainable from other available sources.[379]

Does this qualified privilege apply to journalists seeking to protect '*non-confidential*' information? That was the issue presented during the survey period in two federal cases. In *Gonzalez v. NBC*, the Second Circuit panel held that there is no journalist privilege under federal law to withhold non-confidential information.[380] NBC sought to protect non-confidential video outtakes from an earlier Dateline broadcast from being produced in a civil rights action involving other litigants.[381] The *Gonzalez* court found no binding precedent supporting the proposition that a qualified privilege for confidential information extends to non-confidential data.[382] Nor, said the court, did NBC present any persuasive argument or empirical evidence "as to how disclosure of non-confidential material after a news story has been published will interfere with journalists" editorial decisions.[383] The court concluded that the public interest in non-disclosure cannot be said to outweigh a civil litigant's need for relevant information.[384]

Relying in large measure upon the *Gonzalez* decision, another court in *In re Application of Dow Jones & Co. to Quash Subpoena Ducas Tecum*, decreed that Dow Jones & Co. must give the background materials for three published stories to the defendant in a securities class action.[385] The court rejected the claim of a First Amendment privilege for non-confidential data based on the *Gonzalez* decision.[386] Nor, said the court was there any basis for finding a common law privilege protecting non-confidential information.[387]

D. Privilege Against Self-Incrimination

The United States Supreme Court, in *United States v. Balsys*, held that the Fifth Amendment privilege against self-incrimination does not apply when the feared prosecution involves proceedings in a foreign jurisdiction.[388] This decision resolves a circuit-split over the reach of the privilege. An immigrant from Lithuania was subpoenaed by the Justice Department

379. *Id.*
380. 155 F.3d 618, 627-28 (2d Cir. 1998).
381. *Id.* at 623.
382. *Id.*
383. *Id.*
384. *Id.* at 627.
385. No. 98 MISC. 8-85, 1998 WL 883299, at *8 (S.D.N.Y. Dec. 17, 1998).
386. *Id.* at *2-3.
387. *Id.* at *5.
388. 118 S. Ct. 2218, 2219 (1998).

to testify about his alleged Nazi activities during World War II and the statements he made about them under oath when he immigrated to the United States.[389] The witness conceded that he did not face prosecution here because if proven, the allegations would result only in deportation.[390] But the reluctant witness claimed that he would face prosecution in another country on the basis of his answers.[391] The Second Circuit agreed that he would face a real danger of prosecution by Lithuania and Israel if he gave incriminating answers and it held that he was entitled to claim the privilege.[392] The Supreme Court disagreed.[393]

The Court reasoned in part that if the Fifth Amendment protected against risk of foreign prosecution, the government would not be able to exchange testimony for immunity.[394] This is because a domestic grant of immunity would not be binding in a foreign prosecution.[395] Therefore, our government could not demand the testimony. Moreover, said the majority, "if a witness claiming the privilege ended up in a foreign jurisdiction that, for whatever reason, recognized no privilege under its criminal law, the recognition of the privilege in the American courts would have gained nothing for the witness."[396] The Court therefore concluded that since "the likely gain to the witness fearing foreign prosecution is thus uncertain, the countervailing uncertainty about the loss of testimony to the United States cannot be dismissed as comparatively unimportant."[397]

V. JUDICIAL NOTICE

In an intriguing decision during the year, an Appellate Division, First Department panel held in a dog-bite case that the trial court erred in taking judicial notice that the pit bull breed of dog is "inherently dangerous." In *Carter v. Metro North Associates* plaintiff tenant sued for injuries sustained when he was bitten by a pit bull owned by another tenant.[398] Plaintiff, in order to recover on a theory of strict liability, had to show (1) that the animal had vicious propensities and (2) the defendant knew or should have known of the animal's propensities.[399] In this case, there was no evidence

389. *Id.* at 2221.
390. *Id.*
391. *Id.*
392. 119 F.3d 122, 140 (2d Cir. 1998).
393. *Balsys*, 118 S. Ct. at 2219.
394. *Id.* at 2232.
395. *Id.* at 2235.
396. *Id.* at 2234.
397. *Id.* at 2235.
398. ___ A.D.2d ___, ___, 680 N.Y.S.2d 239, 240 (1st Dep't 1998).
399. *Id.* at ___, 680 N.Y.S.2d at 240.

that the dog had ever bitten anyone before attacking plaintiff.[400] To escape this gap in the proof the plaintiff convinced the trial court to take judicial notice of the vicious nature of the pit bull breed of dog.[401] This, the appellate division found, was a misuse of the doctrine of judicial notice.[402]

Judicial notice is appropriate for matters of common and general knowledge, well-established and authoritatively settled, not for propositions that are uncertain or doubtful.[403] The court noted that on the subject of pit bulls as a breed, there are alternative opinions.[404] Some experts suggest that pit bulls have to be trained to behave viciously.[405] Furthermore, the court explained that scientific evidence more definitive than articles discussing the dogs' breeding history is necessary before it is established that pit bulls, merely by virtue of their genetic inheritance are inherently dangerous or unsuited for domestic living such as, for instance, wolves and leopards would be.[406]

In another decision, the Appellate Division, Second Department sought to correct the "seemingly widespread but mistaken notion" that an item is judicially noticeable merely because it is part of a court file.[407] *Ptasznik v. Schultz* was an action to recover damages for conversion and breach of fiduciary duties.[408] At trial, during his summation, plaintiff's attorney read to the jury the contents of an affidavit of decedent.[409] The affidavit had been in the court's file but had not been marked or introduced in evidence before the summations.[410] The trial judge allowed the affidavit to go to the jury as a 'court exhibit' during jury deliberations.[411] On appeal, plaintiff argued that it was proper for the trial judge to take judicial notice of the affidavit because it was part of the court's file.[412] The appellate division disagreed and reversed the plaintiff's judgment.[413] Some court orders and records are indeed proper for judicial notice. But the court pointed out that "court files are often replete with letters, affidavits, legal briefs, privi-

400. *Id.* at ___, 680 N.Y.S.2d at 240.
401. *Id.* at ___, 680 N.Y.S.2d at 240.
402. *Id.* at ___, 680 N.Y.S.2d at 240.
403. *Id.* at ___, 680 N.Y.S.2d at 240.
404. *Id.* at ___, 680 N.Y.S.2d at 240.
405. *Id.* at ___, 680 N.Y.S.2d at 240.
406. *Id.* at ___, 680 N.Y.S.2d at 240-41.
407. Ptasznik v. Schultz, 247 A.D.2d 197, 199, 679 N.Y.S.2d 665, 666 (2d Dep't 1998).
408. *See id.* at 198, 679 N.Y.S.2d at 666.
409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.*
413. *Id.*

leged or confidential data, *in camera* materials, fingerprint records, probation reports, as well as depositions that may contain unredacted gossip and all manner of hearsay and opinion."[414] These are seldom appropriate for judicial notice.

CONCLUSION

We conclude by highlighting one significant issue that awaits decision during 1999.

The issue to be decided by the New York Court of Appeals arises in *People v. Johnson*.[415] It involves the question of when an accused may be said to have procured the unavailability of a hearsay declarant so as to justify forfeiture of the defendant's normal right to object to inadmissible hearsay.[416] This issue in turn raises the question of how meaningful the 'clear and convincing evidence' standard—which is required to justify the forfeiture finding—really is.[417]

These forthcoming decisions will be among the more prominent to be analyzed in next year's *Survey*.

414. *Id.* at 199, 679 N.Y.S.2d at 667.

415. 250 A.D.2d 922, 673 N.Y.S.2d 755 (3d Dep't 1998), *leave to appeal granted*, 92 N.Y.2d 884, 700 N.E.2d 569, 678 N.Y.S.2d 31 (1998).

416. *Id.* at 924, 673 N.Y.S.2d at 757.

417. *Id.* at 925, 673 N.Y.S.2d at 758.